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Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts

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DISPUTE RESOLUTION IN INDIAN COUNTRY: HARMONIZING *NATIONAL FARMERS UNION*, *IOWA MUTUAL*, AND THE ABSTENTION DOCTRINE IN THE FEDERAL COURTS

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I. INTRODUCTION

Which sovereign's court will decide a case is a question that implicates both power and prerogative. Sovereigns exert power when their courts decide cases, and, particularly when the parties contest a government's jurisdiction over a matter, which court system will have priority may materially affect the balance of power between governments.[1] But disputants always have cared where they litigate, pursuing the perceived advantages of a tribunal they hope will see things their way or that will afford other dispute resolution qualities, including economy, efficiency, finality, and predictability. To resolve the inevitable issues over which of two or more courts with jurisdiction will initially decide a case, a complex, shifting, and often unpredictable set of judicially created rules has arisen to allocate judicial primacy among the courts of competing sovereigns. These rules usually are analyzed under the discipline the law professors call "Federal Jurisdiction." Until recently, the courts and theoreticians writing in this area, struggling to balance powers between state and federal courts, largely ignored the tribal courts.[2] Perhaps predictably, when tribal courts arose and proliferated in the last forty years, the federal courts' allocations of judicial power between tribal courts and their federal and state competitors often cast their decisions in notions of federal Indian law, rather than in the doctrines of federal jurisdiction.

This article addresses the divergence between the doctrine being developed in allocating judicial power between tribal and federal courts and the abstention doctrine applied in contests between federal and state courts. My thesis is that the federal courts' increasing preference for staying or dismissing their cases in favor of tribal courts reflects a

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1. One may speculate on the significance of this power by imagining how the civil rights controversies of the 1960s and 1970s would have developed if the cases were required to be litigated initially in state courts.

2. *See generally* Judith Resnick, *Dependent Sovereign: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671,675-86 (1989); as Professor Resnick observes, the main treatise in this area for many years, *Hart & Wechsler's The Federal Courts and the Federal System*, in several of its editions, barely mentioned the Indian tribes. *Id.* at 686 n. 62.

doctrine needing direction. The Supreme Court's seminal decisions in this area have identified important tribal interests at stake and contain the kernels of, but have yet to articulate clearly, the pertinent interests of the other stakeholders and of the dispute resolution system and how those interests should be reconciled with Indian interests in a federal court's decision whether to proceed. The result increasingly is a jurisprudence that mechanically requires abstention or exhaustion, because courts fail to identify, or undervalue the interests of state and federal governments, and court systems of the private litigants.

First, this article will examine the foundations of the "Indian abstention" doctrine being developed in the federal courts. It will analyze the holdings in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*[3] and *Iowa Mutual Insurance Co. v. LaPlante*,[4] examine the linkage between those Supreme Court decisions, and illustrate the lower court decisions that have applied those decisions to require abstention in ever-broader categories of cases.[5]

Second, to determine whether the broader doctrine developing in the lower courts properly is founded in *National Farmers Union* and *Iowa Mutual*, the article will examine the abstention doctrine principles the federal courts have developed in contests between federal and state courts,[6] and argue that *National Farmers Union* and *Iowa Mutual* reflect applications, respectively, of the abstention doctrines of *Younger v. Harris*[7] and *Colorado River Water Conservation District v. United States*[8] and their progeny. If that analysis is correct, those doctrines imply limits on the scope of the Indian abstention doctrine that the lower federal courts have ignored.[9]

Third, the article seeks to test whether the present application of the Indian abstention doctrine properly is grounded in other important principles and policies of Indian law that some courts and writers have advanced.[10] These arguments generally have carried the day with the federal courts: abstention to allow tribal courts first to address a matter has been deemed necessary, among other reasons, to the "federal policy of promoting tribal self-government [that] encompasses the development

3. 471 U.S. 845 (1985).
4. 480 U.S. 9 (1987).
5. *See infra* Part II.
6. *See infra* Part III.
7. 401 U.S. 37 (1971).
8. 424 U.S. 800 (1976).
9. *See infra* Part IV.
10. *See, e.g.*, Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994); Frank Pommersheim, *Liberation, Dreams, and Hardwork: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 412-13 (1992).

of the entire tribal court system . . .,"[11] or to allow tribal courts to "interpret and apply tribal law."[12] I will argue that, while such policies certainly support deference to tribal courts in many cases, they do not weigh equally in all cases, and should be balanced appropriately against other considerations recognized in decisions applying the abstention doctrine in other contexts.[13]

Potent solutions have been proposed to the problems posed by the shift of judicial power to tribal courts, ranging from statutorily defining the Indian abstention rules[14] to creating a federal Indian Court of Appeals.[15] While I agree that Congress should consider such bold strokes, my proposal is more modest: federal judges should return to the abstention doctrines of *Younger* and *Colorado River* and apply them as appropriate in "Indian abstention" cases, giving due regard for applicable federal Indian policies, to decide whether to abstain or to proceed to address the difficult issues that current disputes present. Infusing Indian abstention decisions with *Younger* and *Colorado River* analysis would impart a balance that may counter the inefficiency and unfairness that often plagues dispute resolution in Indian country. For this jurisprudence to function effectively, it seems clear the lower courts need Supreme Court guidance.

II. THE INDIAN ABSTENTION DOCTRINE

National Farmers Union and *Iowa Mutual*[16] have altered radically the balance of judicial power in Indian country.[17] Both were personal injury suits filed in tribal court by Native American plaintiffs, and in both a non-Indian defendant subsequently filed a federal court action to avoid the tribal court. Both Supreme Court decisions sent the parties back to tribal court. These two Supreme Court decisions form the

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11. *Iowa Mutual*, 480 U.S. at 16-17.

12. *Id.* at 16.

13. *See infra* Part V.

14. *See* Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 Harv. J. L. & Pub. Pol'y 445, 488-89 (1993) (proposing a model for the deregulation of business transactions); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1153-57 (1995) (proposing United States Supreme Court certiorari review of Tribal court decisions).

15. Michael Pacheco, *Finality in Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119, 153 (1991).

16. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

17. I use the term "Indian country" in this article in the non-technical sense, without jurisdictional implications, heeding Fred Ragsdale's warning that "Indian country is an incredibly complex jurisdiction issue disguised in a colorful phrase." Fred L. Ragsdale, "The Deception of Geography," in *American Indian Policy in the Twentieth Century* 65, 69 (Vine DeLoria, Jr., ed. 1985).

foundation, however, for ever-widening barriers to federal court review of far broader classes of cases.

National Farmers Union arose when a member of the Crow Tribe was injured in a motorcycle collision at a Montana public school on fee lands within the Crow Reservation. The tribal member sued the county school district and its insurer in tribal court and obtained a default judgment.[18] Rather than move to set aside the default judgment under an available tribal court procedure,[19] the defendant insurer for the school district sought injunctive relief in the United States District Court for the District of Montana. The federal district court granted the requested injunctive relief, finding that the tribal court lacked civil jurisdiction over the action,[20] and the Ninth Circuit reversed.[21]

Viewed from the standpoint of non-Indian federal court plaintiffs, Justice Stephens' opinion in *National Farmers Union* may appear to have good news and bad news. Favorably, it concludes that the contention that an Indian tribe lacks power to subject a non-Indian property owner to civil jurisdiction of a tribal court "is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331."[22] The bad news for would-be federal court plaintiffs is that this federal question generally cannot be litigated in federal court: *National Farmers Union* concluded that the federal court should not address this federal question "until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."[23] Although *National Farmers Union* provided exceptions to this rule, they are of narrow scope: exhaustion may not be required when (1) tribal jurisdiction is asserted in bad faith, (2) tribal jurisdiction violates "express jurisdictional prohibitions," or,

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18. 471 U.S. at 847-48.

19. *Id.* at 856 n.22. The Crow Tribal Court's rules provided for a motion to set aside a default judgment. *Id.*

20. 660 F. Supp. 213, 217 (D. Mont. 1983) (finding specifically that a tribal court lacked jurisdiction over non-Indian activities on fee lands within the reservation because the judge found lacking any of the grounds held necessary to support regulatory jurisdiction in such circumstances by Montana v. United States, 450 U.S. 544, 556-57 (1981)).

21. 737 F.2d 1320, 1323 (9th Cir. 1984).

22. 471 U.S. at 852. *National Farmers Union* requires "exhaustion" of tribal remedies, rather than that the federal court should "abstain" pending the tribal court's determination of its jurisdiction. *Id.* This choice of labels may have little significance given that the Supreme Court has described a decision to abstain as requiring "exhaustion of state remedies." Steffel v. Thompson, 415 U.S. 452, 473 (1974). Professor Skibine has argued, however, that Indian abstention cases should be decided under principles of administrative law exhaustion. Skibine, *supra* note 10, at 204.

23. *National Farmers Union*, 471 U.S. at 857. On remand, following Supreme Court decision in *National Farmers Union*, the Crow Tribal Court denied the insurer's motion to dismiss, finding jurisdiction under the *Montana* test, and the Crow Tribal Court affirmed. Sage v. Lodge Grass School Dist., Civ. No. 82-287 (Crow Trib. Ct. Sept. 12, 1985); *see* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 250-51 (1991) (discussing implementation of the tribal court exhaustion requirement).

(3) where exhaustion would be futile for lack of an adequate tribal court opportunity to challenge jurisdiction.[24]

Iowa Mutual reached a similar result in a diversity case where the federal court plaintiff tried a bit harder in the tribal system. In *Iowa Mutual*, a member of the Blackfeet Indian Tribe who was injured in an accident on a ranch on the Blackfeet Reservation in Montana, sued the ranch owner, a Blackfeet tribal member, and its insurance carrier in Blackfeet Tribal Court. The insurance company moved the Tribal Court to dismiss for lack of jurisdiction over the subject matter, and the Tribal Court denied, holding that the tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation.[25] The Blackfeet Tribe has a Court of Appeals, but the insurer could not obtain tribal appellate review until after trial on the merits.

The insurer then filed suit in federal court under the diversity statute. It sought a declaration that it was under no duty to defend or indemnify its insured. Unlike the insurance company in *National Farmers Union*, the insurer did not challenge the jurisdiction of the tribal court under federal question jurisdiction;[26] rather, it sought a declaration that it had no duty to defend or indemnify the ranch owner because LaPlante's injuries fell outside its coverage.[27] The Supreme Court affirmed the lower court decisions, holding that the insurance company must exhaust available tribal remedies, including tribal appellate court review.[28]

Justice Marshall's opinion for the majority in *Iowa Mutual*[29] reflects the kind of analysis that has resulted in inflexible application of *National Farmers Union* and *Iowa Mutual* in the lower courts. Justice Marshall found in *National Farmers Union* a policy that "directs" a federal court to stay its hand until the tribal court has determined its jurisdiction.[30] *Iowa Mutual* found a federal policy against placing the federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[31] Finally, it concludes that "[a]djudication of such matters by any nontribal court

24. *National Farmers Union*, 471 U.S. at 856 n.21.
25. *Iowa Mutual*, 480 U.S. at 11-12.
26. *See* 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part) (noting that the insurer did not question the jurisdiction of the tribal court).
27. *Id.* at 13.
28. *Id.* at 19.
29. *Id.* at 20-22 (Stevens, J., dissenting).
30. *Id.* at 16.
31. *Iowa Mutual*, 480 U.S. at 16.

also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."[32]

Iowa Mutual does declare in a footnote[33] that the rule it prescribes "is analogous to principles of abstention articulated in *Colorado River Water Conservation District v. United States*,"[34] which sets flexible standards to guide the abstention decision in federal cases generally.[35] While this reference might have borne the seed of a jurisprudence that borrows from the federal courts' experience under the diversity statute, there is little evidence that the lower courts have heeded such advice.

Justice Marshall's opinion makes clear, however, that the federal district court had subject matter jurisdiction under the diversity statute.[36] Ninth Circuit cases rejecting diversity jurisdiction over cases cognizable in tribal court[37] were "[r]elegated to a dismissive footnote"[38] of *Iowa Mutual*.[39] Justice Marshall's majority opinion on the effect of the diversity jurisdiction statute focuses on the seemingly uncontroversial question whether the diversity statute divests tribal courts of jurisdiction, concluding that it does not.[40] That statute, however, seems unhelpful since, although the diversity jurisdiction does not "limit" state court jurisdiction, it vests federal courts with concurrent jurisdiction over some cases, and federal courts do not universally defer to state courts in all such cases.[41] *Iowa Mutual* does not address federal cases defining abstention standards to be applied in diversity cases, except for its reference to "principles of abstention" recognized in *Colorado River*.[42]

Iowa Mutual also prescribed a procedure for federal court review of tribal jurisdictional rulings that, while seemingly assured, can best be described as narrow and cumbersome. "[A]t a minimum," federal court review of questions decided by the tribal courts should await final action by tribal appellate courts.[43] Then, if the tribal appeals court

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32. *Id.*

33. *Id.*

34. 424 U.S. 800 (1976).

35. *See infra* Part III.

36. *See Iowa Mutual*, 480 U.S. at 17-19, 20-22 (Stevens, J., concurring in part and dissenting in part).

37. *See, e.g.*, R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (9th Cir. 1986).

38. Brown & Desmond, *supra* note 23, at 259.

39. *Iowa Mutual*, 480 U.S. at 20 n.13.

40. *Id.* at 17-18 (stating that Congress, in enacting and amending 28 U.S.C. § 1332, "has never expressed any intent to limit the civil jurisdiction of the tribal courts.").

41. *Compare* Meredith v. City of Winter Haven, 320 U.S. 228, 238 (1943), *and*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) (refusing to abstain), *with*, County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959); *see generally*, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237 (1989).

42. *See infra* notes 62-68 (discussing *Colorado River* abstention).

43. *Iowa Mutual*, 480 U.S. at 17.

affirms tribal court jurisdiction, "petitioner may challenge that ruling in the District Court."[44] And, the resulting federal court review will be limited to the jurisdictional issue, unless the federal court determines that the tribal court lacked jurisdiction; in that instance, presumably, the federal court plaintiff will start from scratch in federal court.[45]

It is little wonder, then, that many lower courts have rigidly required abstention in Indian cases, seemingly with little regard to the factors which motivate abstention decisions in the off-reservation situation. Following *National Farmers Union* and *Iowa Mutual*, the federal courts have required abstention, unlike in *National Farmers Union* and *Iowa Mutual*, where there was no ongoing tribal court dispute[46] and when federal court jurisdiction was invoked by the sole Indian party in the case.[47] Similarly, exhaustion has been required even though all parties could be joined in the federal court, but not in tribal court.[48] And, exhaustion has been required although there were substantial proceedings in the federal court and significant delay before the motion to abstain was filed.[49] Finally, federal courts have required exhaustion in disputes regarding tribal tax or regulatory power over non-Indian activities on fee lands and areas largely opened to non-Indian settlement, where, under *Bourland*, *Brendale*, and *Montana*, the existence of tribal jurisdictional authority presents a federal question that is highly fact-dependent.[50] Cases such as these reflect that the federal courts have interpreted *National Farmers Union* and *Iowa Mutual* as laying down rigid rules requiring abstention in almost all circumstances. Yet, the holdings of *National Farmers Union* and *Iowa Mutual* neither mandate

44. *Id.* at 19 (indicating by the Court's citation to *National Farmers Union* that review then will be under federal question, not diversity, jurisdiction).

45. *Id.*

46. *See, e.g.*, Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991); United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., Inc., 947 F.2d 1405, 1407 (9th Cir. 1991) ("Whether proceedings are . . . pending in . . . tribal court is irrelevant.").

47. Wellman v. Chevron U.S.A., Inc., 815 F.2d 577 (9th Cir. 1987).

48. Middlemist v. Secretary of United States Dep't of Interior, 824 F. Supp. 940, 946 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994).

49. *See, e.g.*, Crawford v. Genuine Parts Co., 947 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); United States v. Tsosie, 849 F. Supp. 768, 770-71 (D.N.M. 1994).

50. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *see also, Pittsburg & Midway Mining Co. v. Watchman*, 1995 WL 231635 (10th Cir. April 19, 1995).

all of these results, nor require ignoring the federal courts' decisions in the abstention and Indian jurisdiction area.[51]

III. THE ABSTENTION DOCTRINE IN THE FEDERAL COURTS

The federal courts' abstention doctrine is animated by two major interests: limiting federal courts' intrusion upon important areas of state policy and avoiding duplicative, often "reactive," litigation, pending concurrently in state and federal court. The federal courts early held the notion that "[t]he pendency of a prior suit in another jurisdiction is not a bar [to a federal action] . . . even though the two suits are for the same cause of action."[52] Over time, the Supreme Court recognized exceptions to this rule that justified a federal court's decision to stay or dismiss its case pending decisions in state proceedings. It has recognized four classes of cases where specific state or federal interests supported staying the federal action pending the resolution of state court proceedings.

Termed "*Pullman*," "*Burford*," "*Younger*," and "*Colorado River*" abstention, each of the four prongs of the abstention doctrine allows a federal court to stay its hand in circumstances shaped to deflect a specific form of federal-state friction. *Pullman* and *Burford* abstention focus on defusing federal-state conflict by allowing federal courts to avoid unnecessary or intrusive resolution of unsettled issues of great import to the state. In *Pullman*, this involved a federal constitutional issue which might have been mooted by a state court's interpretation of state law.[53] *Burford* abstention applies in cases that would disrupt a comprehensive state regulatory scheme[54] or that present difficult, unresolved state law issues of substantial public import that transcend the results in the specific case.[55]

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51. Cases declining to abstain exist. *See, e.g.*, Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993); Altheimer & Gray v. Sioux Mfg. Co., 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); Burlington Northern R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992); Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988); Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., 84 B.R. 638 (D.S.D. 1988).

52. Stanton v. Embrey, 93 (3 Otto) U.S. 548, 554 (1876); *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 660-75 (1989). This article does not address specific statutory limitations on federal court jurisdiction that require dismissal or abstention.

53. *See, e.g.*, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

54. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943); *Burford* sanctioned dismissal of an action that would inject the federal courts into management of Texas' comprehensive oil and gas regulatory scheme.

55. A variant strain of the *Burford* doctrine, allowing a federal court to stay (not dismiss) to seek state court resolution of an unsettled question of state law, such as whether state law empowered cities to condemn utility property, is reflected in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959). Scholars debate whether *Burford* and *Thibodaux* should be considered separate doctrines. See the thoughtful discussion of the abstention doctrine in James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1079 (1994).

Younger abstention may apply when the state's interest in smooth functioning of its criminal justice system or its civil enforcement machinery is threatened by a federal court action to enjoin pending state criminal proceedings.[56] Originally limited to federal actions to enjoin state criminal proceedings, the *Younger* doctrine expanded to allow abstention when a federal declaratory judgment would affect pending criminal proceedings[57] and to federal actions to enjoin state civil enforcement proceedings.[58] *Younger* abstention is available, however, only when state proceedings are pending.[59]

The fourth strand of the abstention doctrine was premised originally on considerations of judicial economy found to justify federal court abstention when concurrent cases were pending in certain matters governed by state law.[60] An early trend towards liberal federal court abstention in duplicative litigation cases was sharply constrained, however, by the Supreme Court's decisions in *Colorado River Water Conservation Dist. v. United States*[61] and *Moses H. Cone Memorial Hospital Co. v. Mercury Constr. Co.*[62] *Colorado River* and *Moses H. Cone* reined in lower court discretion to abstain, concluding that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"[63] and cautioning that abstention is warranted only in "exceptional circumstances" arising from real benefits the stay will yield for concrete procedural or substantive interests.[64] These cases articulate five (or six) factors to be weighed in determining whether "exceptional circumstances" are present to warrant staying a federal suit due to the pendency of concurrent litigation in state court:[65]

> the relative progress of the federal and state court litigation; the importance of avoiding piecemeal litigation; whether there is a congressionally declared policy that would be served by

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56. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

57. *See* Samuels v. Mackell, 401 U.S. 66 (1971).

58. Juidice v. Vail, 430 U.S. 327 (1977).

59. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974); *accord*, Ankenbrant v. Richards, 112 S. Ct. 2206, 2216 (1992).

60. *See, e.g.*, Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

61. 424 U.S. 800 (1976).

62. 460 U.S. 1 (1983).

63. *Colorado River*, 424 U.S. at 817; *see also Moses H. Cone*, 460 U.S. at 13-16.

64. *Colorado River*, 424 U.S. at 813, 818; *Moses H. Cone*, 460 U.S. at 25-26 ("The task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the surrender of that jurisdiction.").

65. The federal courts have generally agreed in the non-Indian context that *Colorado River* abstention is proper only if there are pending state court proceedings that are truly duplicative of the federal ones, where the same parties are litigating the same issues in both forums. *See, e.g.*, Crawley v. Hamilton County Commr's, 744 F.2d 28, 31 (6th Cir. 1984) (finding abstention inappropriate because there were not parallel state court proceedings); Bankers Trust Co. v. Chatterjee, 636 F.2d 37, 41 (3d Cir. 1980) (finding that since proceedings were not truly duplicative, neither could be avoided).

abstention; the relative inconvenience of the federal court to the parties; and whether there is a federal question being litigated.[66]

The *Colorado River* factors have also been applied to actions brought in federal court by tribes.[67] There is no "tribal exception" to *Colorado River*.

IV. THE ABSTENTION DOCTRINE AND TRIBAL COURTS: HARMONIZING *NATIONAL FARMERS UNION* AND *IOWA MUTUAL* WITH *YOUNGER* AND *COLORADO RIVER*

The lower courts' difficulty in discerning distinctions that take into account the interests of litigants and the needs of a truly federal dispute resolution system arises, in my view, from the failure of *National Farmers Union* and *Iowa Mutual* to articulate adequately the analysis that I find embedded in the two decisions. Put simply, the Supreme Court wrote large the Indian law and policy considerations underlying its decisions and left obscure, but still decipherable, its federal jurisdiction premises.

National Farmers Union and *Iowa Mutual* reflect a doctrine woven not only from the fabric of federal Indian law, but also from strands of the abstention doctrine. While little recognized as such, the two cases seem clearly to be offspring of the *Younger* and *Colorado River* prongs of the abstention doctrine, respectively. In both *National Farmers Union* and *Iowa Mutual*, the tribal court plaintiffs filed first, and the federal action was filed in reaction to the tribal court filings. Consequently, in each case, there was a tribal court proceeding pending at the time the federal district court addressed the question whether to abstain in light of the concurrent jurisdiction of the tribal and federal courts. But there were differences between the two cases that would require different treatment under the abstention doctrine, and *National Farmers Union* and *Iowa Mutual* appear to recognize and give meaning to those differences.

A. *NATIONAL FARMERS UNION* AS A *YOUNGER* ABSTENTION CASE

The federal court plaintiff in *National Farmers Union* joined tribal officials and sought to enjoin both the proceedings in tribal court and the enforcement of its default judgment. This attempt to employ the

66. CHEMERINSKY, *supra* note 52, at 669; *see Colorado River*, 424 U.S. at 818; *Moses H. Cone*, 460 U.S. at 23 (finding that existence of a federal question weighs heavily against abstention); *Moses H. Cone* articulates a sixth factor, the adequacy of the forums to protect the parties' rights. 460 U.S. at 23.

67. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566-67 (1983).

federal court as a shield against official conduct of a sovereign falls within the *Younger* line of cases.[68] The Supreme Court's invocation of the *Younger* doctrine is reflected, albeit subtly, by *National Farmers Union's* citation at a critical juncture to *Juidice v. Vail*.[69] *Juidice v. Vail* was a significant first application of *Younger* in a non-criminal proceeding; the federal court abstained in an action to enjoin a state civil contempt proceeding initiated on behalf of a private creditor against a debtor, one of the federal court plaintiffs, by the federal court defendant, a justice of New York county court.[70] The three circumstances which *National Farmers Union*'s footnote 21 holds would excuse exhaustion of tribal remedies (bad faith jurisdictional assertions, express jurisdictional prohibitions, and inadequate opportunities to challenge jurisdiction) are reviewed and found absent in the state proceedings in *Juidice v. Vail*.[71]

Juidice seems, in many ways, a fitting analogy to *National Farmers Union*. It applied *Younger* in a civil setting, and both federal court plaintiffs sought relief from state judicial proceedings. However, in *Juidice* and *Younger v. Harris*, and in the *Younger* lines of cases generally, the state court proceeding sought to be enjoined in federal court characteristically was initiated by state officials.[72] Even so, *National Farmers Union* closely paralleled *Juidice* because the federal court plaintiff in *National Farmers Union* sought to enjoin enforcement of a Crow Tribal Court judgment and named as defendants in federal court the Crow Tribe, its Tribal Council, the Tribal Court, judges of the court and the chairman of the Tribal Council.[73] The Supreme Court has

68. *See supra* Part III.

69. 430 U.S. 327, 338 (1977) (citing *National Farmers Union*, 471 U.S. 845, 856 n.21 (1985)).

70. Juidice v. Vail, 430 U.S. 327, 329, 335-36 (1977).

71. *Id.* at 337-38 (quoting Huffman v. Pursue, 420 U.S. 592, 611 (1975)). Professor Skibine has argued, correctly, that the three exceptions to abstention recognized in *National Farmers Union*'s footnote 21 are "similar in spirit" to those applied in administrative law exhaustion cases. Skibine, *supra* note 10, at 205. However, the Supreme Court's direct citation to *Juidice v. Vail* and the near identity of the exceptions recognized in *National Farmers Union* footnote 21 and the page it cites in *Juidice* suggest that *Younger*, not administrative law, underlies *National Farmers Union*'s abstention requirement. Note that *Juidice* addressed "express constitutional prohibitions," rather than the "express jurisdictional prohiitions," which were the focus of *National Farmers Union*.

72. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (involving an action to enjoin state criminal prosecution); Steffel v. Thompson, 415 U.S. 452, 455 (1974) (involving an action for declaratory judgment against state officials and private parties). *Younger* abstention cases often have arisen in the context of actions against state officials acting "under color of state law," sought to be enjoined under 42 U.S.C. § 1983, with federal court jurisdiction premised on 28 U.S.C. § 1343(3).

73. *See National Farmers Union*, 471 U.S. at 848.

since extended *Younger* to actions to enjoin collection of a state court judgment, and a sizable one at that.[74]

B. *IOWA MUTUAL* AS A *COLORADO RIVER* ABSTENTION CASE

Iowa Mutual, by a similar analysis, is revealed to be a liberal application of *Colorado River* abstention. Since no tribal officials were prosecuting criminal actions or instituting civil enforcement mechanisms against the insurance company in *Iowa Mutual*, *Younger* abstention would not apply. Before federal jurisdiction was invoked, three private parties were litigating a private dispute in tribal court. However, the pendency of proceedings in tribal court at the time of LaPlante's motion to dismiss required the motion to be treated under *Colorado River*.[75] This conclusion is reinforced because *Iowa Mutual*'s only citation to "federal jurisdiction" case law outside the Indian law area is its recognition that:

> Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances.[76]

Although *Iowa Mutual* regrettably declined to define fully the "certain circumstances" that support abstention, this reference to *Colorado River* for guidance in future cases seems unmistakable. *Iowa Mutual* confuses the matter by its reference earlier in the same footnote to "the exhaustion rule enunciated in *National Farmers Union* . . . ".[77] Although this suggests a unitary "exhaustion rule" applicable to *National Farmers Union* and *Iowa Mutual*, the differences between the cases and their citations to different authority refute the existence of such a rule. Clearly, the exhaustion required in *National Farmers Union* was not premised upon *Colorado River*, because it arose in a *Younger* context and imported exceptions to its exhaustion requirement from

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74. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-11 (1987), the Supreme Court majority held that the district court should have abstained under the Younger doctrine, to require Texaco to assert its constitutional objections to Pennzoil's $10 billion dollar judgment in Texas courts. Interestingly, the *Pennzoil* majority, like *National Farmers Union*, placed substantial reliance on *Juidice v. Vail*. *See* Anne Althouse, *The Misguided Search For State Interest In Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. Rev. 1051 (Nov. 1988).

75. *See supra* at notes 61-68.

76. 480 U.S. 9, 16 n.8 (1987).

77. *Id.*

Younger jurisprudence. *Iowa Mutual*, by contrast, has the character of a *Colorado River*, not a *Younger*, case, and this is reinforced by its reliance on, again in footnote 8, "*Colorado River*, [where] as here, strong federal policy concerns favored resolution in the non-federal forum."[78] In *Iowa Mutual*, the Supreme Court properly turned to *Colorado River* rather than *Younger* abstention because the common law damage action plainly did not implicate the interest in avoiding disruption of government enforcement machinery that animates the *Younger* doctrine.

Iowa Mutual, however, failed to touch all of the *Colorado River* bases,[79] and that may have spawned confusion in the lower courts. *Iowa Mutual*'s discussion of the case certainly considers matters that implicate *Colorado River* factors, such as inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums; however, *Iowa Mutual* failed to clarify that it was addressing those factors by their *Colorado River* handles. Similarly, Justice Marshall's decision in *Iowa Mutual* does not reflect recognition that the "strong federal policy concerns [that] favored resolution in the non-federal forum" it cites in *Colorado River* expressly were found in that case to be material to its abstention factor of "avoiding piecemeal litigation."[80] Nonetheless, *Iowa Mutual* clearly is a *Colorado River* case.

C. APPLYING *YOUNGER* AND *COLORADO RIVER* TO INDIAN COUNTRY CASES

Significant differences would flow from correctly determining at the onset whether a case raises *Younger* or *Colorado River* abstention issues-or if neither is satisfied. First, both doctrines require in the first instance, as was the case in *National Farmers Union* and *Iowa Mutual*, the pendency of concurrent actions in federal and tribal court. This would alter the results in numerous cases. Second, different considerations apply under the two doctrines to determine whether the federal court should proceed. In the *Younger* context, the exceptions in footnote 21 of *National Farmers Union*, focusing on bad faith harassment, express limitations on tribal court jurisdiction, and the absence of a procedure to challenge tribal jurisdiction, are dispositive. *Colorado River* abstention, by contrast, contemplates that federal courts will retain a broader class of cases because concerns for disrupting tribal

78. 480 U.S. at 16 n.8 (citing *Colorado River*, 424 U.S. 800, 819 (1976)). The cited page of *Colorado River* analyses one of the four factors it requires be considered in abstention decisions, "the desirability of avoiding piecemeal litigation."

79. *See supra* note 69.

80. *See Colorado River*, 424 U.S. at 818-19.

enforcement machinery are absent or reduced; hence, the six factors of *Colorado River* and *Moses H. Cone*, focus on the interests of the parties and the dispute resolution system reflected in the relative progress of the federal and state court cases and convenience and comprehensiveness of the adjudications. These fairness and efficiency interests must be weighed to determine whether the interests of judicial administration favor abstention or retention of federal court jurisdiction.

These distinctions are not merely formal: in the *National Farmers Union* context, strong tribal interests counsel federal court caution before enjoining a first-filed tribal court criminal or civil enforcement action, or the enforcement of a tribal court judgment, absent the specific, narrow exceptions of *National Farmers Union's* footnote 21. In the *Iowa Mutual* situation, the primary considerations should be those of the litigants and the efficient resolution of the dispute; the relatively weaker tribal interests in requiring tribal members or non-Indian parties to Indian country litigation to litigate private disputes in tribal court must be weighed against the expense, inconvenience, or uncertainty to the parties that the *Colorado River* factors are designed to avoid.

Crawford v. Genuine Parts Co.[81] illustrates the effect of applying the wrong rule. *Crawford* was a diversity jurisdiction personal injury damage action filed by an injured Native American in state court. The defendants removed the case from state to federal court. There was no pending tribal court action and no tribal civil or criminal enforcement proceeding. Consequently, *Crawford* should be analyzed under the *Iowa Mutual* prong of the Indian absention doctrine.

The Native American plaintiff delayed until twenty-three days before a trial setting to move to dismiss to require exhaustion of tribal remedies;[82] the state/federal court case had been pending some five years when the district court denied the motion to dismiss, based in part on the delay in filing the motion.[83] The Ninth Circuit reversed, holding "we do not perceive room in the Supreme Court's precedents for a decision not to defer."[84] Ignoring the flexible factors of *Colorado River* that expressly consider delay in one forum, the Ninth Circuit found conclusive the absence of the three *Younger* factors articulated in *National Farmers Union*.[85]

If *Colorado River* guides abstention decisions in Indian country diversity cases under *Iowa Mutual*, *Crawford* is plainly wrong. It is

81. 947 F.2d 1405 (9th Cir. 1991).
82. 947 F.2d at 1407.
83. *Id.*
84. *Id.* at 1408.
85. *Id.*

erroneous under *Colorado River* on two grounds: there was no pending tribal court proceeding, and the Ninth Circuit held that it lacked discretion to consider factors that are clearly pertinent under *Colorado River*. *Crawford* seems to present no tribal interest significant enough to compel abstention given the obvious prejudice to the non-Indian defendant and the waste of the federal judge's efforts over several years. While tribal courts may have interests in handling such cases, their interests should not automatically trump those of all other participants in such cases.

D. "COMITY" IS A TWO-WAY STREET

The *Younger* and *Colorado River* underpinnings of *National Farmers Union* and *Iowa Mutual* are reflected in *Iowa Mutual*'s emphasis upon the notion of "comity" to guide exhaustion decisions. While the term does not appear in *National Farmers Union*, *Iowa Mutual* describes the *National Farmers Union* holding as resting upon the conclusion that "considerations of comity direct that Tribal remedies be exhausted before the question is addressed by the District Court."[86] "Comity" arose in the abstention jargon in *Younger v. Harris*, which described the concept as two-edged, embodying a "proper respect for state functions," but no

> blind deference to 'state's rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments. . . .[87]

The "comity" concept contemplates a jurisprudence that identifies the interests of competing sovereigns and seeks a resolution that harmonizes legitimate interest of all concerned governments in the controversy. Nonetheless, these conclusions about *National Farmers Union* and *Iowa Mutual* reflect the contours of a two-pronged doctrine. Each of the four abstention strains reflects the balancing of specific state interests against the interest of the federal court plaintiff in its choice of forum; states, like tribes, are sovereigns, and, although the interests of tribes and states in judicial power over such controversies are different,

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86. *Iowa Mutual*, 480 U.S. at 15 (citing *National Farmers Union*, 471 U.S. at 857). *See also* 480 U.S. at 16 n.8 ("exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.").

87. Younger v. Harris, 401 U.S. 37, 44 (1971); *see* Rehnquist, *Taking Comity Seriously*, 46 STAN. L. REV. at 1086 ("the watch word is not deference to one forum, but sensitivity to both."); *see also*, Phillip W. Lear and Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995)

they seem of comparable weight. *Younger* and *Colorado River* abstentions both require the existence of a presently pending state court proceeding and then condition abstention on determinations that the state court proceeding be a fair and adequate one. These abstention doctrines suggest a two-pronged rule for use in Indian abstention cases: there must be a pending tribal court proceeding, and, in most cases *Younger* or *Colorado River* abstention factors. In the absence of pending tribal court or administrative proceedings, there would have to be specific tribal regulatory interests or difficult unresolved issues of tribal law to justify abstention under *Pullman* or *Burford.*

V. TRIBAL VS. OTHER COURTS' POWERS OVER DISPUTE RESOLUTION IN INDIAN COUNTRY

A. THE STATE COURTS AND THE TRIBAL COURTS

There remains the argument that tribal courts have unique exclusivity of jurisdiction supporting "automatic" exhaustion. A review of modern authority reflects that, while tribal courts enjoy a powerful priority over state courts, federal courts have traditionally served as arbiters of the status of tribes, except where congressional interests expressly limited their jurisdiction.

Non-Indians' experience with tribal courts, generally, is a recent one, and the first modern Supreme Court decisions to define the role of tribal courts arose in conflicts between tribal courts and state courts. The 1959 Supreme Court decision in *Williams v. Lee*[88] is the watershed. A non-Indian owner of a federally licensed trading post on the Navajo reservation sued to collect a debt owed by a Navajo living on the reservation arising from a transaction at the on-reservation trading post. *Williams* held that an Arizona state district court lacked jurisdiction, and that the action must proceed in Navajo tribal court.

Williams discerned a central question that framed the Supreme Court's determinations concerning the jurisdiction of state versus tribal courts: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[89]" That influential phrase has shaped the cases that subsequently have defined the balance of judicial power, and has underlain the recognition of other powers in Indian country.

88. 88. 358 U.S. 217 (1959).
89. 358 U.S. at 220.

What is most remarkable about *Williams v. Lee* is its holding that only the tribal court had jurisdiction over the action, despite the fact that the state court plaintiff had served a summons on the Navajo defendant when the debtor had been off the reservation.[90] Ordinarily, a state court has subject matter jurisdiction over transitory "actions, like the action in *Williams* on a debt arguably occurring outside Arizona's borders," and the state court's power to proceed depends on personal jurisdiction over non-resistant parties.[91] While *Williams v. Lee* has been described as declaring that tribal court jurisdiction over on-reservation controversies is "exclusive,"[92] it addressed only state and tribal claims to jurisdiction over the collection action, and it emphasized that "no Federal Act has given state courts jurisdiction over such controversies."[93]

Williams v. Lee reflects, however, that the jurisdiction it found was not grounded in territorial hegemony. It recognized that state courts "have been allowed to try non-Indians who committed crimes against each other on a reservation."[94] *Williams* also observed that state court may entertain suits by Indians against outsiders.[95] While *Williams v. Lee* invested tribes with important new dispute resolution powers, its recognition of state power over such on-reservation controversies clarifies that it is founded both in geography, the on-reservation situs of the transaction and parties, and in tribal affiliation,[96] including the tribal membership of the defendant.[97]

Further reflecting the Court's balance between tribal and other courts are the Supreme Court's decisions in two cases, both named *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering,*

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90. 358 U.S. at 218.

91. *See* Fred L. Ragsdale, Jr., *The Deception of Geography* in AMERICAN INDIAN POLICY IN THE 20TH CENTURY 72 (Vine DeLoria, Jr. ed. 1985):

In the *Williams* case, there was personal jurisdiction because both parties were before the court. The holding was that the Arizona court lacked subject matter jurisdiction, however. In other words, that court could not hear this kind of case. If the same facts had happened in London, England, the same people, the same debt, and identical service of the summons, then unquestionably Arizona would have had subject matter jurisdiction.

92. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW at 1-3 (1987).

93. 358 U.S. at 222. It appears that the citizenship of the parties could not support federal court in diversity jurisdiction.

94. *Williams*, 358 U.S. at 220 (citing People of State of New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

95. *Williams*, 358 U.S. 217 (citing Felix v. Patrick, 145 U.S. 317 (1892)).

96. *See* Ragsdale, *The Deception of Geography supra* note 91, at 71 n.16.

97. Cases following *Williams v. Lee* which find tribal court primacy over state courts generally are consistent with *Williams v. Lee*. Kennerly v. District Court, 400 U.S. 423 (1971), found a tribal council resolution which purported to give tribal court and state court concurrent jurisdiction over suits against tribal members ineffective to establish jurisdiction in Montana state court over an action to collect an on-reservation debt against tribal members. Fisher v. District Court, 424 U.S. 382, 387-90 (1976), held that Montana courts lack jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe and residents of its Reservation.

P.C.[98] Both *Wold* cases rejected state courts' efforts to decline subject matter jurisdiction over an action filed by a tribe in state court against non-Indians arising from on-reservation dealings, at least when the tribal court did not have jurisdiction over such a claim.[99] The Supreme Court's decision in *Wold II* went further, holding that North Dakota could not condition access to its courts on a tribe's waiving its immunity from suit.[100] The *Wold* cases, consequently, obligate state courts to assume and decide cases involving tribes, at least when necessary to an efficient and complete resolution of the controversy. While these cases reflect a tribal court primacy over state courts, they reflect at least a privilege in some circumstances for Indian plaintiffs to use state courts. This suggests that tribal court jurisdiction, even as against state courts, generally is not mandatory.

B. THE FEDERAL COURTS VS. THE TRIBAL COURT

The federal courts have played a central role in resolving disputes within Indian country and in shaping the contours of tribal sovereignty. Federal question jurisdiction[101] has served traditionally as the major vehicle resolving disputes concerning the status of the tribes, the scope of their power, and the applicability of federal law to them. Federal question jurisdiction was a broader font of judicial power within Indian country than elsewhere, because tribal governmental and possessory rights intrinsically were created and defined by federal law.[102] The *Oneida* cases reflect the federal court's vigorous use of the federal question jurisdiction in Indian law cases in the 1960s and 1970s.

Although the Supreme Court yielded federal court jurisdiction to tribal courts in *Santa Clara Pueblo v. Martínez*, it did so under a specific federal statute.[103] The Indian Civil Rights Act of 1968[104] had subjected

98. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) [hereinafter *Wold I*]; and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) [hereinafter *Wold II*].

99. *See* 467 U.S. at 148-51; 476 U.S. at 883.

100. 476 U.S. at 889. The *Wold II* court also found material that "the tribe has no other effective means of securing relief for civil wrongs," including the potential need for state court enforcement. *Id.*

101. *See* 28 U.S.C. § 1331 (1988); U.S. Const. art. III, § 2; a specific statute makes clear that the federal courts have jurisdiction over actions by any "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" to bring federal question actions. *See* 28 U.S.C. § 1362 (1988); *see generally*, F. COHEN HANDBOOK OF FEDERAL INDIAN LAW at 311-12 (1982).

102. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974) (possessory action by tribe presents federal question because "Indian title is a matter of federal law and can be extinguished only with federal consent."); *see also* Oneida County v. Oneida Indian Nation, 470 U.S. 226, 284 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

103. 436 U.S. 49 (1978).

104. 25 U.S.C. § 1301-03 (1988).

Indian tribes, for the first time, to constitution-like duties similar to those applicable to state or federal governments. The ICRA did not, however, expressly provide for federal court jurisdiction over actions arising under the statute, and *Santa Clara Pueblo* determined that no implied right of action existed to enforce the ICRA. Federal court review of tribal governmental actions would, the Court concluded, interfere with "tribal autonomy and self-government beyond that created by the change in substantive law itself" and may "undermine the authority of the tribal court."[105] This the Court found impermissible under *Williams v. Lee*, because it would "infringe on the right of the Indians to govern themselves."[106] While *Santa Clara Pueblo* clearly sent ICRA plaintiffs to tribal court, it left intact federal question[107] and diversity jurisdiction over actions on Indian land.[108]

C. ABSTENTION IN FEDERAL QUESTION CASES IN INDIAN COUNTRY

The factor recognized under the *Colorado River* doctrine by *Moses H. Cone*, that is, the extent to which federal question jurisdiction underlies a controversy,[109] may weigh heavily against abstention in Indian cases. Federal decision of federal question cases has long been regarded as instrumental to obtain the benefits of federal court experience in "federal specialties,"[110] and because of "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the consti tution."[111] In 1824, Chief Justice Marshall described Supreme Court review of federal issues on appeal from a state court after the case has been shaped by fact findings of an unsympathetic state court, as an "insecure remedy" for federal rights.[112] Consequently, federal courts

105. 436 U.S. at 59.

106. *Id.* The Court also found the express provision of an habeas corpus remedy, and the failure of the ICRA to mention other remedies, reflected the intention that only habeas corpus relief for ICRA violates be available in federal court. *Id.* at 65.

107. *National Farmers Union*'s holding affirms that federal question exists in an action to test tribal court jurisdiction.

108. *See* 28 U.S.C. § 1332 (1988) (following *Williams v. Lee*, there was a split in the circuits over whether diversity jurisdiction over actions involving Indians on reservations was barred because the exercise of jurisdiction would interfere with tribal self-government). *Compare* Hot Oil Service, Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966) (exercise of diversity jurisdiction barred) *with* Poitra v. DeMarrias, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975); *see supra* note 37.

109. *Moses H. Cone*, 460 U.S. at 23.

110. ALI Study on the Division of Jurisdiction, Commentary on federal question jurisdiction at 70; Indian law easily fits the class of cases that includes bankruptcy, patent, and federal anti-trust.

111. Martin v. Hunter's Lessee, 14 U.S. 304, 347-48 (1816); Professor Clinton, however, has argued that the independence of the federal judges and effectually the Supremacy Clause vouch-safed by life tenure and related Constitutional protections primarily motivated federal court review of federal questions. *See* Robert N. Clinton, *A Mandatory View of Early Implementation of and Departures From the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1542 (1986).

112. Osborn v. Bank of the United States, 22 U.S. 738, 822 (1824).

have felt the need to retain federal question jurisdiction to protect federal rights, despite the fact that such cases usually also involve state law issues and impact state policies.[113] Additionally, federal review of federal questions at some appropriate stage arguably is constitutionally mandated by Article III, section 2 of the Constitution, which requires that "The judicial Power [of the United States] shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties."[114] In the highly fact-dependent jurisdiction controversies framed by recent Supreme Court case law which allocate regulatory jurisdiction and other powers between tribes and states,[115] the power to find the facts may decide the law. Important legitimacy interests may favor having the relatively disinterested federal forums decide those cases. Courts applying the Indian abstention doctrine should consider the significant, if not dispositive, role that initial federal review of facts may have in federal question cases. These federal interests in allocating power in Indian country are reflected in recent cases that refuse to abstain in cases brought by tribes to enjoin state officials. In *Sycuan Band of Mission Indians v. Roache*[116] and *Fort Belknap Indian Community v. Mazurek*,[117] the federal courts refused to require exhaustion of remedies and exercised federal question jurisdiction, concluding that "the jurisdictional issue is paramount and federal..."[118] In a similar setting, the federal courts have employed a procedure that allows a tribe's federal claims to be decided in federal court after state law claims are decided in state proceedings.[119] The same regard should be given to the federal interest in resolving federal questions when the contest is between state and tribal courts.

Federal question jurisdiction is implicated directly in cases brought under federal Indian policies. This is reflected in developing Supreme Court jurisprudence which parses regulatory jurisdiction among states and tribes based upon landholding and demographic patterns.[120] Those

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113. *See* England v. Louisiana Bd. of Med. Examiners, 375 U.S. 411, 416-17 (1964) (review of state court decision by the Supreme Court is "an inadequate substitute" for an initial determination by a federal district court. How the facts are found will often dictate the decision of federal claims.")

114. *See generally*, Clinton, *Mandatory Federal Court Jurisdiction*, 86 COLUM. L. REV. at 1541-43.

115. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-24 (1989); *see also* South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

116. 38 F.3d 402 (9th Cir. 1994).

117. 43 F.3d 428, 431-32 9th Cir. 1994).

118. Belknap Indian Community v. Mazurek, 43 F.3d 428, 432 (9th Cir, 1994).

119. *Confederated Salish and Kootenai Tribes v. Simonich*, 29 F.3d 1398, 1406 (9th Cir. 1994).

120. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-24 (1989); *see also* South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

cases reflect that tribal powers depend substantially on the extent to which tribal property and members are affected. The recent decisions applying the abstention doctrine, by contrast, generally disregard such factors.[121] These seemingly irreconcilable lines of cases result in vesting tribes with power to resolve disputes regarding lands over which they may lack power to regulate and, consequently, may dramatically affect the outcomes of the heavily fact-dependent jurisdictional controversies framed by *Montana* and *Brendale*. In these cases, the federal courts have dismissed federal question actions, even though parallel proceedings were not pending in tribal courts. *Younger* and *Colorado River* doctrines would counsel exercise of the federal question jurisdiction unless countervailing tribal policies protected under *Pullman* or *Burford* abstention were present.[122]

D. ABSTENTION IN DIVERSITY JURISDICTION CASES IN INDIAN COUNTRY

The policies underlying federal courts' diversity jurisdiction address concerns prevalent in jurisdictional disputes in Indian country. Regarding diversity jurisdiction, Justice Story wrote "[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[123] The drafters of the diversity statutes also feared elected judges or legislative review: "Not unnaturally, the commercial interests of the country were reluctant to expose themselves to the hazards of litigation before such courts as these."[124] While the premises of diversity jurisdiction are questioned contemporarily,[125] and the threshold amount in controversy recently raised,[126] the

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121. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) *cert. denied*, 115 S. Ct. 779 (1995); United States v. Tsosie, 849 F. Supp. 768 (D.N.M. 1994); *see also* Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993), decision on remand, ___ U.S.L.W. ___ (D.N.M. Jan. 30, 1995); Pittsburg & Midway Mining Co. v. Watchman, 1995 U.S.L.W. 231635 (10th Cir. April 19, 1995).

122. *Pullman* could justify abstention if resolution of a difficult and unsettled issue of tribal law could moot a federal constitutional issue; *Burford* could justify abstntion if federal court intervention would seriously disrupt functioning of tribal administrative machinery in an area of important tribal policy. *See supra*, Part III.

123. Martin v. Hunter's Lessee, 1 Wheat. 304, 347 (1816).

124. *See* Henry Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 498 (1928); *see also* Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948)(among two other reasons, "the desire to avoid regional prejudice against commercial litigants. . ."); P. Bator, ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1051-53 (1973).

125. *See* Wechsler, *Federal Jurisdiction and the Revision of the Federal Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234-40 (1948).

126. *See* Act of Nov. 19, 1988, Pub. L. 100-702, 102 Stat. 4646, amending 28 U.S.C. § 1332(a) to require amount in controversy of $50,000.

policy remains, grounded in the federal Constitution, Article III, section 2 and the federal Judicial Code.[127]

The proper functioning of the abstention doctrine in Indian country diversity cases is not fully articulated in *Iowa Mutual*. The federal courts generally have resisted requests to abstain in diversity cases; the doctrine seems to serve no purpose in a contest between federal and state courts because the removal statute[128] reflects a policy that any case cognizable under the diversity statute may be heard at the option of the defendant in federal court.[129] The Supreme Court recognized in *Iowa Mutual* that diversity jurisdiction may exist in on-reservation disputes, but it declined to address the weight that federal courts should give to the concerns of the diversity statute to even the playing field by neutralizing the possible effect of local bias by tribal courts against outsiders. This concern often motivates diversity filings in the Indian country context and the policies underlying the diversity statute compels the federal courts to weigh this factor in an abstention decision.

VI. CONCLUSION

A proper doctrine allocating judicial power between tribal and federal courts would require a federal court to take into account interests that are lost in the analysis of recent cases. Applying the abstention doctrine developed in the federal/state context would be a first step towards a jurisprudence that considers the interests of all parties to current cases and the needs of the dispute resolution system.

127. *See also* Clinton, *Mandatory Federal Jurisdition*, 86 Colum. L. Rev. at 1548, 1583.

128. 28 U.S.C. § 1332.

129. An influential early study concluded that, in diversity cases, "the disadvantages of abstention outweigh any conceivable gain in requiring state determination of state questions in routine diversity suits between private litigants involving no issue of public law." AMERICAN LAW INSTITUTE, STUDY ON THE FEDERAL JURISDICTION at 218 (citing Meredith v. City of Winter Haven, 320 U.S. 228 (1943)).